Hon. Richard A. Jones

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

RENTBERRY, INC., a Delaware corporation, and Delaney Wysingle, an individual, Plaintiffs, v. The City of SEATTLE, a Washington municipal corporation, Defendant.	Civil Action No. 2:18-cv-00743-RAJ **PLAINTIFFS' RESPONSE TO CROSS-MOTION FOR SUMMARY JUDGMENT** NOTE ON MOTION CALENDAR: October 19, 2018 ORAL ARGUMENT REQUESTED

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INTRODUCTION

The City slapped an up to two-year-long moratorium on the use of rental bidding platforms, candidly admitting that it is "uncertain" whether a ban on such sites furthers any legitimate government interest. That is not how the First Amendment works. When censorship is at issue, the First Amendment requires the City to produce evidence that it *needs* to stifle speech before it is permitted to do so. *See Turner Broadcasting System v. FCC*, 512 U.S. 622, 664 (1994) (government must do more than "posit the existence of the disease sought to be cured" before imposing a speech restriction).

Perhaps recognizing this black-letter law, the City now attempts to narrow the Ordinance. But even under the City's reading, the moratorium imposes a ban on soliciting and posting bids on rental housing. Communicating a bid is protected commercial speech. The moratorium must therefore satisfy intermediate scrutiny, which it cannot do because of its underinclusive reach, its speculative approach to speech regulation, and its failure to use less-restrictive alternatives.

Contrary to the City's argument, Wysingle and Rentberry both have standing to bring this First Amendment claim. Wysingle suffered a concrete injury of being deprived the use of bidding platforms to seek a tenant for his vacant rental property, an injury that he could reasonably face again during the course of the moratorium, and Rentberry can raise a First Amendment claim on behalf of its users and itself because its communications platform is cut off from the Seattle market.

SUPPLEMENTAL STATEMENT OF FACTS

Rentberry incorporates by reference the Statement of the Case in Plaintiffs' Motion for Summary Judgment (Plaintiffs' MSJ), Dkt. # 22 at 1-4, but several facts deserve additional emphasis. First, even if the moratorium only prohibits Rentberry's bidding feature, landlords still cannot post advertisements on Rentberry without violating the moratorium. Rentberry's auctioning technology cannot be turned off or removed for particular users or markets. Declaration of Oleksiy Lyubynskyy in Support of Motion for Summary Judgment, Dkt. # 22-5 ¶ 5 (Lyubynskyy Decl.). Bidding is an integral part of Rentberry's business model and software. *Id.* Like other online platforms such as Ebay that depend on bidding for their core functionality, Rentberry simply

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cannot function without the bidding component. Hence, a landlord cannot post an advertisement on Rentberry without including the bidding feature, and applicants cannot apply without placing a bid. *See id.*

Second, Wysingle had a clear intent to use Rentberry if not for the moratorium. Wysingle testified in his declaration and his deposition that he wanted to use Rentberry to advertise the property once the unit was ready to rent. Declaration of Delaney Wysingle dated 8/11/18 in support of Motion for Summary Judgment, Dkt. #22-4 ¶ 4 (Wysingle Decl.); Wysingle Deposition Transcript at 37-38 (Exhibit 6). To that end, he explored Rentberry's website on multiple occasions and called to speak with Rentberry personnel about the site. Exhibit 6 at 38, 54, 68-69.

Wysingle understood, however, that he could not use Rentberry's rental bidding platform because the moratorium forbade use of the nonseverable bidding feature. *See* Wysingle Decl. ¶ 4. Thus, instead of advertising his home as he wished, he opted to post his advertisement on Zillow, which lacks a bidding feature. *Id.* ¶ 5. On August 17, 2018, he entered into a ten-month lease agreement with a new tenant. Declaration of Ethan Blevins in Support of Motion for Summary Judgment ¶ 6 (Blevins Decl.).

ARGUMENT

I. Delaney Wysingle and Rentberry have standing to challenge the moratorium

The City's justiciability arguments are contrary to the undisputed evidence. It is undisputed that Wysingle had a vacancy during the course of the moratorium and wanted to use Rentberry's bidding platform to fill that vacancy. Wysingle Decl., Dkt. # 22-4 ¶¶ 3-4. He was injured because the moratorium prevented him from communicating with prospective tenants using Rentberry's bidding functionality. Nor is Wysingle's claim moot, since he could easily have another vacancy during the course of the moratorium and the uncertain duration of the tenancy means that his injury is capable of repetition yet evades review.

The City also argues that Rentberry lacks standing because the moratorium does not regulate any of Rentberry's speech. This is incorrect—Rentberry has third-party standing, which allows Rentberry to represent the interests of its users in court. Rentberry also has suffered its own

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injury because it cannot operate its website (which both communicates on its own and facilitates communication among others) in the Seattle market.[1]

A. Wysingle's claims are justiciable

1. Wysingle suffered a concrete injury

Wysingle has standing to challenge the Ordinance's infringement of his speech rights. The Ninth Circuit has held on many occasions that "First Amendment cases raise 'unique standing considerations,' that 'tilt[] *dramatically* toward a finding of standing.'" *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010) (emphasis added) (citing *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003), and *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000)). In the context of First Amendment cases, the Ninth Circuit has explained that facial constitutional challenges come in two varieties: First, a plaintiff seeking to vindicate his own constitutional rights may argue that an ordinance "is unconstitutionally vague or . . . impermissibly restricts a protected activity." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). Second, "an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court." *Hunt v. City of Los Angeles*, 638 F.3d 703, 710 (9th Cir. 2011). "The former sort of challenge . . . may be paired with the more common as-applied challenge, where a plaintiff argues that the law is unconstitutional as applied to his own speech or expressive conduct." *Santa Monica Food Not Bombs v. City of Santa Monica (Food Not Bombs)*, 450 F.3d 1022, 1033-34 (9th Cir. 2006) (citations omitted); *see also Foti*, 146 F.3d at 635.

The moratorium states: "Landlords and potential tenants are prohibited from using rental housing bidding platforms for real property located in Seattle city limits." SMC § 7.24.090.A. This affects a landlord's speech interests in several respects. First, it prevents landlords from soliciting bids. Second, it prevents landlords from *receiving* tenants' bids. Supreme Court caselaw is clear

[1] The City bristles at the moniker "website ban," but the uncontroverted record evidence shows that the moratorium bars any use of Rentberry for advertising and applying for Seattle properties because landlords cannot advertise properties on Rentberry without the bidding feature, and tenants cannot apply without posting a bid. Lyubynskyy Decl., Dkt # 22-5 ¶ 5. In a very real and practical way, the moratorium bans the use of a website.

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that the First Amendment's protection is afforded "to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Consumers Council*, 425 U.S. 748, 756 (1976).

Wysingle plainly expressed his intent to use Rentberry to advertise his property and use the bidding feature during the summer of 2018, while the Ordinance remains in effect, to find a new tenant. Complaint, Dkt #1 ¶¶ 17-18; Wysingle Decl., Dkt # 22-4 ¶¶ 3-4; Exhibit 6 at 20, 37. Had the Ordinance not prohibited Wysingle from using Rentberry, he would have done so already. Wysingle Decl., Dkt # 22-4 at ¶ 4; Exhibit 6 at 32.

This is more than sufficient to establish standing under *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001), in which the owner of three closed adult businesses established standing by submitting a declaration that "if the Ordinance is declared unconstitutional, 'it is my intent to reopen my business.'" *Id*. at 1008. This sufficed even though Clark's business license expired and he did not apply for a new license or renew his old one. *Id.* at 1006. Likewise, Wysingle's injury is caused by the moratorium preventing him from using rental bidding platforms and that injury will be resolved if the moratorium is struck down. He does not need to go through the futile process of subscribing to a service that he cannot use in order to establish his standing—it suffices that he plans to use it if the moratorium is struck down.

Additionally, in *Food Not Bombs*, 450 F.3d at 1034, and *Bayless*, 320 F.3d at 1006, the Ninth Circuit held that standing for First Amendment claims exists where a pre-enforcement plaintiff shows that he altered his expressive activities to comply with the statutes at issue and alleges apprehension that those statutes would be enforced against him. *See also Lopez*, 630 F.3d at 790. Here, Wysingle stated that he wanted to communicate with potential tenants via Rentberry's rent-bidding platform but, fearing prosecution under the Ordinance, he advertised on Zillow (which does not have a bidding feature) instead.[2] Wysingle Decl., Dkt # 22-4 ¶ 5. This

[2] "[I]t would turn respect for the law on its head for us to conclude that [a plaintiff] lacks standing to challenge the provision merely because [the plaintiff] chose to comply with the statute and challenge its constitutionality." *Bayless*, 320 F.3d at 1007.

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alteration in his expressive activities establishes his standing to challenge the Ordinance as a violation of his First Amendment rights.

The City hopes to deny Wysingle a hearing to vindicate his First Amendment rights. The City's arguments, however, rely on mischaracterizations of undisputed evidence and pertinent caselaw. The City claims that, at the time Wysingle filed his Complaint, he was not subject to the Ordinance because he did not have a rental unit available to let, and therefore lacks standing. Opp. and XMSJ, Dkt. # 26 at 10:15-17. This is false. The Ordinance took effect on April 29, 2018, and the Complaint was filed on May 23, 2018. During that time, Wysingle's Cloverdale rental property was vacant[3] and undergoing renovation in preparation for Wysingle's search for a new tenant. Wysingle Decl., Dkt. # 22-4 ¶¶ 1-2.

The City also argues that Wysingle did not suffer an injury because he lacked a "specific timeframe" by which he planned to rent out his home. Opp. and XMSJ, Dkt. # 26 at 10:21-22; *see also id.* at 4:17-19. This mischaracterizes Wysingle's testimony. When asked for a date by which he planned to list the property for rent, Wysingle testified that he was unsure of an exact date because he was at the mercy of the contractors, but he then said, "I'm guessing by the end of the month [July]." Exhibit 6 at 20. In fact, this plan was realized when he completed renovations on August 4, within a week of his estimate. Wysingle Decl., Dkt. # 22-4 ¶ 5.

The City also incorrectly states that Wysingle did not have concrete plans to use Rentberry. *See* Opp. and XMSJ, Dkt. #26 at 11:6-7. This claim contradicts both his signed declaration and his deposition testimony. His declaration states that he would use Rentberry to list his property but for the moratorium. Wysingle Decl., Dkt # 22-4 ¶ 4. He corroborated this statement in his deposition testimony, stating that "my goal is to use the bidding platform." Exhibit 6 at 37. Wysingle also described multiple visits to bidding platform websites and even phone calls with Rentberry staff, fortifying his testimony that he wants "to give the bidding process a try." Exhibit 6 at 38, 54, 68-69. He also described, in response to repeated questions, multiple features that he wished to use

[3] The previous tenant's lease was to have expired on May 31, 2018, but the tenant broke his lease in February and paid through the end of March. Wysingle Decl., Dkt # 22-4 ¶ 2.

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on Rentberry, including the bidding feature. *See, e.g.*, *id.* at 59-60. Wysingle thus clearly demonstrated a concrete intent to use Rentberry.[4]

The City's standing argument relies on *Lopez v. Candaele*, 630 F.3d 775, a case that is noteworthy for its dramatic differences from this case. *See* City's Opp. and XMSJ, Dkt. # 26 at 10-14. In that case, a community college student made a speech in a Speech 101 class that advocated marriage only between a man and a woman, a thesis that the professor found profoundly offensive. *Lopez*, 630 F.3d at 782-83. Plaintiff Lopez alleged that he feared adverse consequences based on the school's sexual harassment policy, in violation of his First Amendment rights. *Id.* at 784. The Ninth Circuit first explained the generous standing doctrine applied to First Amendment plaintiffs: In pre-enforcement cases, the plaintiff must demonstrate "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* at 785 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). A plaintiff demonstrates a "realistic danger" by "alleging an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and . . . a credible threat of prosecution thereunder." *Id.* (quoting *Babbitt*, 442 U.S. at 298) (alteration in original). Lopez failed to establish any of the standing factors, but most critically, he failed to show that anyone at any time made even the slightest suggestion that his speech implicated the sexual harassment policy, including Lopez's own attorney in pre-litigation correspondence to the school. *Id.* at 790.

By contrast, there's no question that Wysingle owns property within the city of Seattle that he wished to advertise and rent via Rentberry's bidding platform during the operative dates of the Ordinance. The threat of enforcement is clear from the City of Seattle's website. A section of the website for the Seattle Department of Construction & Inspections entitled "Codes We Enforce (A-Z)"[5] includes the "Rent Bidding" ordinance challenged in this lawsuit. The lack of prosecutions to

[4] The City also puts great emphasis on an inaccurate statement made in Wysingle's withdrawn declaration in which he mistakenly stated that his house was still occupied in May 2018, when in fact it had been vacated in February 2018. Opp. and XMSJ, Dkt. # 26 at 4:17-21. The City does not explain how this trivial misstatement about which month Wysingle's prior tenant vacated the premises bears in any way on this dispute. In any case, Wysingle's signed declaration accompanying his motion for summary judgment corrects this oversight. *See* Wysingle Decl., Dkt. # 22-4 ¶ 2.

[5] https://www.seattle.gov/dpd/codesrules/codes/default.htm.

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date cannot prevent an affected landlord from challenging the Ordinance. *Cf. Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1896 (2018) (Sotomayor, J., dissenting) (constitutionality of political apparel ban decided on the merits although "there is no evidence that any individual who refused to remove a political item has been prohibited from voting, and respondents maintain that no one has been referred for prosecution for violating the provision").

2. Wysingle's claim is not moot

Wysingle's claims are not moot because his injury could easily recur, and the injury is capable of repetition yet evading review. Under the mootness doctrine, "courts look to changing circumstances that arise after the complaint is filed" that strip a plaintiff of "a legally cognizable interest in the outcome." *Clark*, 259 F.3d at 1006, 1011. A case is not moot if another injury is foreseeable. In *Clark v. City of Lakewood*, for instance, the closure and license expiration of the adult cabaret did not moot the case because Clark's "stated intention is to return to business." *Id.* at 1006, 1012. Similarly, Wysingle would have used Rentberry's rent-bidding platform but for the Ordinance and would do so again if the Ordinance were declared unconstitutional and his rental property again became vacant. *See* Wysingle Decl., Dkt. # 22-4 ¶¶ 3-4.

Likewise, a claim is not moot if the injury previously suffered is capable of repetition yet evades review, often because of a timeframe that is too brief to fully litigate the claim before the injury temporarily subsides. *See N.A.A.C.P. v. City of Richmond*, 743 F.2d 1346, 1353 (9th Cir. 1984). Several courts in the Ninth Circuit have recognized that tenancy issues fit neatly into this "capable of repetition, yet evading review" exception. *See Mendoza v. Frenchman Hill Apartments Ltd. P'ship*, No. CV-03-494, 2005 WL 6581642, at *3 (E.D. Wash. Jan. 20, 2005); *Gallman v. Pierce*, 639 F. Supp. 472, 480 (N.D. Cal. 1986). The length of vacancies are unpredictable but likely to be short in a tight market like Seattle's, demonstrating that Wysingle's claim is "capable of repetition, yet evading review," because (1) "the duration of the challenged . . . injury [is] too short to be fully litigated; and (2) there [is] a reasonable likelihood that [he] will be subject to the action again." *N.A.A.C.P.*, 743 F.2d at 1353. Wysingle's previous tenant broke his lease, creating an unexpected vacancy that lasted for a period of only a few months. Wysingle Decl., Dkt. # 22-4

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¶¶ 2, 5. That is not enough time to litigate the constitutional issues created by the moratorium. *See Gallman*, 639 F. Supp. at 480 ("A period of a month, and certainly of three days, is a very brief time in which to litigate" constitutional issues arising from the end of the tenancy.). It is reasonable to contemplate such an event happening again unexpectedly before expiration of the one-or-two-year moratorium.

Indeed, it is easily foreseeable that the moratorium will be extended by another year, in which case Wysingle's current 10-month lease term will expire during the moratorium even absent early termination. The City Council has discretion to extend the moratorium if the Council needs more time to review the study or the relevant departments need more time to complete it. SMC § 7.24.090.C. Rentberry, through counsel, has made repeated requests to find out what progress the departments have made in the study mandated by the City Council. Blevins Decl. ¶ 5; Exhibits 7 and 8. So far, the City has not responded with any evidence that the departments have even embarked on this mandate. *Id.* Given the City's failure to come forth with evidence halfway into the moratorium's first year, it is reasonable to expect that the moratorium will be extended. Wysingle's claims are not moot.

B. Rentberry has third-party standing to raise First Amendment concerns on behalf of itself and its users

In addition to Wysingle's justiciable claim,[6] Rentberry has third-party standing to raise this First Amendment claim on behalf of its users and standing in its own right.

In assessing standing, courts may properly consider whether a "third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement" and whether that "third party can reasonably be expected to properly frame the issues and present them with the necessary adversarial zeal." *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). Third-party standing is most appropriate in a First Amendment case like this one, because courts have recognized that a strict application of the traditional rules of standing "would have an

[6] With Wysingle's standing established, the Court has no need to inquire further about the injury-in-fact standing of Rentberry. *Food Not Bombs*, 450 F.3d at 1034; *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 918 (9th Cir. 2004).

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intolerable, inhibitory effect on freedom of speech." *Eisenstadt v. Baird*, 405 U.S. 438, 445 n.5 (1972); *see Epona v. City of Ventura*, 876 F.3d 1214, 1220 (9th Cir. 2017) (allowing wedding venue to bring First Amendment claim on behalf of potential customers who were required to obtain a permit for wedding events).

Here, Rentberry has third-party standing to challenge the City's Ordinance in federal court. As Seattle admits, the Ordinance prohibits landlords and tenants from using Rentberry's online platform. Opp. and XMSJ, Dkt. # 26 at 12. The Ordinance thus inflicts a direct First Amendment injury on countless landlords and tenants in Seattle—an injury that Rentberry is entitled to assert. *See, e.g.*, *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1009 n.5 (E.D. Cal. 2017) (owner and operator of webpage has third-party standing to assert the rights of its users).

Further, Rentberry has standing in its own right. As its chief executive officer noted in his declaration, Rentberry's auctioning technology cannot be turned off—landlords and tenants cannot decline to use the bidding feature on the site. Lyubynskyy Decl., Dkt. # 22-5 ¶ 4. The City fails to provide any evidence to controvert Rentberry's declaration. The City argues consistently that "Rentberry's non-litigation documents do no [sic] refer to its auctioning technology as key or central to how its website functions," Opp. and XMSJ, Dkt. # 26 at 13 n.7, but, in the very next sentence, acknowledges a Rentberry whitepaper that explains Rentberry's bidding technology is "part of Rentberry's Unique Selling Proposition." *Id.* With help from the City, Rentberry has provided uncontroverted evidence that its bidding technology is a fundamental part of what makes Rentberry unique. Bidding is what defines Rentberry's business model and technological platform, and it is not severable from the website. Moreover, Rentberry has First Amendment interests in disseminating its proprietary software, which the City has barred from being used in Seattle. *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445-46 (2d Cir. 2001) (computer code is protected by the First Amendment).

The City specifically called out Rentberry as a platform targeted by this moratorium. Asha Venkataram, CB 119198: Prohibiting Use of Rental Bidding Platforms (Mar. 7, 2018), Dkt. # 22-3 at 1. Article III empowers Rentberry to defend itself and its users against such a targeted

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regulation. *See Melendres v. Arpaio*, 695 F.3d 990, 999 (9th Cir. 2012) (individuals targeted by government policy have Article III standing to raise constitutional claims).

II. The moratorium restricts speech

The rent-bidding moratorium restricts speech because (1) it applies to advertisements of Seattle properties posted on a rent-bidding website; and (2) it bars landlords and tenants from soliciting or posting bids related to those advertisements.

The moratorium applies to any "rental bidding housing platform," defined as "a person that connects potential tenants and landlords via an application based or online platform to facilitate rental housing auctions wherein potential tenants submit competing bids on certain lease provisions." SMC § 7.24.020. As Rentberry's opening brief explained in a careful analysis of the text, the moratorium's plain language bans use of a whole platform, not just a particular function on the platform. *See* Plaintiffs' MSJ, Dkt. # 22 at 8-9. The definition of "rental bidding platform" underscores the plain meaning of platform by defining it as a "person" operating the features on a site, not just a specific feature. SMC § 7.24.020.

The City does not respond to Rentberry's textual analysis, nor does the City offer any alternative analysis. In contrast to Rentberry's straightforward reading of the text, the City relies upon one declaration from a low-level compliance officer who has worked for the City for less than a year as its sole basis for arguing that "plaintiffs grossly misconstrue the Ordinance." City's Opp. and XMSJ, Dkt. # 26 at 6; Declaration of Jessica Long, Dkt. # 28 ¶ 2. Certainly, the compliance officer's declaration might serve as evidence about the likelihood of prosecution (although the Seattle Department of Construction and Inspections is clear that it is actively enforcing the Ordinance), but her declaration cannot transform the plain text, particularly when neither the City's brief nor the declaration actually analyze the Ordinance's language. *See National Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018) (a court relies on the plain language of a statute, especially where the government chooses to ignore it, rather than confront it).

After its conclusory treatment of the text, the City misrepresents the evidence by insisting that individuals can legally post advertisements on Rentberry—they just cannot solicit or post bids.

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Yet Rentberry has presented uncontroverted evidence that it is impossible to advertise properties on Rentberry without the bidding feature. Lyubynskyy Decl., Dkt. # 22-5 ¶ 2 ("[A] landlord cannot refuse to receive custom offers from tenant-users. The bidding feature is an integral component of the site."). Thus, the City's repeated assurance that Seattle landlords like Wysingle can use Rentberry to advertise their properties is false, even if the City's narrow reading of the moratorium as applying only to bidding is correct.

Regardless, the moratorium still restricts speech by preventing Rentberry's users from soliciting or posting a bid on Rentberry's site.[7] Bidding is protected commercial speech. The Supreme Court has held on multiple occasions that communicating a price offer enjoys First Amendment protection. *See, e.g.*, *44 Liquormart v. Rhode Island*, 517 U.S. 484, 489 (1996) (retail price advertising of alcoholic beverages is protected speech); *Virginia State Bd. of Pharmacy*, 425 U.S. at 756 (holding that quoting a price for prescription medication is protected speech); *see also Nat'l Ass'n of Tobacco Outlets, Inc. v. Providence, R.I.*, 731 F.3d 71, 76-77 (1st Cir. 2013) ("Pricing information concerning lawful transactions has been held to be protected speech by the Supreme Court."); *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012) (price advertising is "quintessentially" commercial speech). These cases did not just hold that communication *about* a price is protected—the protection extends to the listing of the price itself. It was in the context of a restriction on price advertising that the Supreme Court said: "As to the consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia State Bd. of Pharmacy*, 425 U.S. at 763. Price is a key component of the commercial communication that buyers and sellers live by. *See* Friedrich Hayek, *The Use of Knowledge in Society*, 35 The American Economic Review 519, 526-27 (1945) (describing the "true function of the price mechanism" as a means "for communicating information" about the market).

[7] The City's claim that the "entirety of plaintiffs' argument departs from a false premise stemming from a misreading of the Ordinance" misses the mark. Opp. and XMSJ, Dkt. # 26 at 6. The centerpiece of Rentberry's claim has always focused on bidding. All the parties agree that the Ordinance restricts bidding, and Rentberry has consistently argued that bidding is protected speech that the City cannot restrict without satisfying First Amendment standards.

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The City, despite clear precedent to the contrary, insists that quoting a price is conduct, not speech. But posting a bid for a rental unit is just as much an act of communication as quoting a price for a prescription drug in *Virginia State Board of Pharmacy* or advertising the price of alcohol in *44 Liquormart*. *Virginia State Bd. of Pharmacy*, 425 U.S. at 757; *44 Liquormart*, 517 U.S. at 489; *see also Dep't of Prof. Reg. Bd. of Accountancy v. Rampell*, 621 So. 2d 426, 428 (Fla. 1993) ("By prohibiting CPAs from competitive bidding, the Department restricts economic expression constituting commercial speech."). Posting a bid is not a "business transaction," but instead provides valuable information that facilitates an *anticipated* transaction. This is the very definition of speech that "propose[s] a commercial transaction." *Va. State Bd. of Pharmacy*, 425 U.S. at 776. In fact, because the bidding process is reciprocal, it has stronger communicative content than posting a unilateral price in advertising.[8]

The City tries to downplay the moratorium as nothing more than a regulation on price. Yet there is a well-established difference between regulating a price and regulating a party's right to communicate a price. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) ("In regulating the communication of prices rather than prices themselves, § 518 regulates speech."). Contrary to the City's hyperbolic concern that Plaintiffs' arguments would saddle all economic regulation with First Amendment scrutiny, this case follows the clear distinction supported by caselaw between price regulations and speech regulations related to price, whether that "price speech" be via advertisement or bid. *See Va. State Bd. of Pharmacy*, 425 U.S. at 756 ("[T]he protection afforded is to the communication, to its source and its recipients both.").

Because the City mislabels bidding as commercial conduct, much of the First Amendment caselaw that it relies upon is inapposite. The City, for instance, writes at some length about incidental burdens on speech and expressive conduct, as in cases such as *Rumsfeld v. FAIR*, 547 U.S. 47 (2006). *See* Opp. and XMSJ, Dkt. # 26 at 16. But bidding is not expressive conduct—it is speech. All the cases the City cites about expressive conduct, cases involving payment of wages

[8] Inexplicably, the City claims that the "Plaintiffs never even attempt to explain how participating in an online action is an expressive act." Opp. and XMSJ, Dkt. # 26 at 16. To the contrary, in the complaint, in the withdrawn Motion for Preliminary Injunction, and in the Motion for Summary Judgment, Plaintiffs extensively argued that soliciting and posting bids constitute commercial speech. *See* Complaint, Dkt. #1 ¶¶ 9, 31-32, 50; Plaintiffs' MSJ, Dkt. # 22 at 5-7.

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or short-term rental booking services, are immediately distinguishable on this simple basis. *See id.* Likewise, the City's argument that it lacked a censorial motive is irrelevant; when a law regulates speech on its face, the government's motive does not matter to the First Amendment analysis. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015) ("In other words, an innocuous justification cannot transform a facially content-based law into one that is content-neutral.").

III. The moratorium fails intermediate scrutiny

A. The moratorium does not directly advance the City's interests

Under intermediate scrutiny applicable to commercial speech restrictions, the City carries the burden of demonstrating that the moratorium directly advances a substantial government interest. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). There are three fundamental problems with the moratorium under this direct advancement step: (1) the alleged harms that the City seeks to curtail are speculative; (2) the moratorium is not logically related to the City's asserted interest in studying rental bidding platforms; and (3) the moratorium is underinclusive with respect to rental bidding. *See* Plaintiffs' MSJ, Dkt. # 22 at 14-17.

Now backpedaling from the Ordinance's admission that the moratorium is patently speculative in nature, the City claims that it has sufficient evidence that Rentberry causes the harms the City feared. This claim contradicts the Ordinance itself, in which the City directs multiple departments to embark on a one-or-two year study to discover whether rental bidding platforms are harmful. Ordinance 125551, Dkt. # 22-1 at 3-4. The Ordinance's plain language establishes that the City did not have sufficient evidence—the moratorium's recitals expressly state that the City is "uncertain" whether rental bidding platforms will hurt the Seattle housing market or contravene local regulations. *Id.* at 1:23-25. *See also Southwestern Bell Tel., L.P. v. Moline*, 333 F. Supp. 2d 1073, 1083 (D. Kan. 2004) ("The party seeking to uphold the restriction on commercial speech carries the burden of justifying it. A governmental entity may not meet its burden on this issue by presenting evidence that consists of nothing more than mere speculation and conjecture.").

The moratorium supposedly serves the City's interest in discovering whether a more lasting speech restriction is necessary. This is akin to California's speech restriction on the Internet Movie

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Database, where California candidly admitted that it did not yet have evidence of the harm it feared. *IMDb.com, Inc. v. Becerra*, 257 F. Supp. 3d 1099, 1102 (N.D. Cal. 2017). The district court responded: "Restrict speech first and ask questions later, the government seems to say. This ignores the First Amendment's heavy presumption *against* restricting speech of this kind." *Id.* So it is with the City here—it has imposed a speech burden before discovering the information that it admits it needs to justify regulating rental-bidding platforms.

The evidence that the City now cites in its opening brief is the same evidence that the City Council considered and found to be inadequate to draw a firm conclusion regarding harm. Ordinance 125551, Dkt. # 22-1 at 1:23-25.[9] Moreover, the City has not posited any evidence that the rental bidding platforms conflict with fair housing regulations—the other concern raised by the City. Nor, it appears, has the City gathered any further evidence of harm. Rentberry requested that the City update Plaintiffs on the status of the study that the Ordinance contemplates. Blevins Decl. ¶ 5; Exhibits 7 and 8. The City has not offered any such updates—suggesting that the study has yet to begin. *Id.*

The moratorium also lacks a logical connection to the City's asserted interest in studying rental bidding. It bans rental bidding platforms and then charges City departments to study their impact. This is not rational. It is merely a conclusory, speculative, vague, and circular suggestion that if the City does not regulate rental bidding before it proliferates, then the consequences for the housing market could be "significant." Opp. and XMSJ, Dkt. # 26 at 19-20. What these "significant" consequences are the City does not and cannot say (hence the need for a study), and presuming a finding of harm before the City has completed its studies is the kind of circular reasoning that cannot satisfy First Amendment scrutiny.

The City cannot restrict speech in advance just because preventing "proliferation" of such speech will make it easier to impose hypothetical regulations later. Such a rationale is overtly speculative—the City does not know whether such rental bidding will proliferate or how such

[9] This was a fair conclusion, given that the Council committee only heard from college students—no economists or other experts were present to offer testimony, nor were any stakeholders from a rental bidding platform present to make their case. *See* http://www.seattlechannel.org/mayor-and-council/city-council/2018/2019-housing-health-energy-and-workers-rights-committee/?videoid=x87650 (last visited Oct. 2, 2018).

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proliferation will make a regulatory structure more difficult to impose. Nor does the City know at this point whether such a regulatory structure will be necessary at all. Even if the moratorium could make the City's regulatory enforcement easier in the future, that rationale does not outweigh speech interests: "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). *Any* speech could have speculative harms that a government would like to study before the speech is uttered—but speculation is not a constitutional justification to preemptively ban speech.

The moratorium's underinclusive scope also undermines the City's interests. A regulation with an underinclusive reach "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 802 (2011). A law is underinclusive if it "regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015).

The moratorium is underinclusive because it only targets one narrow venue in which bidding on residential housing can occur. *See* Plaintiffs' MSJ, Dkt. # 22 at 17-18. It does not prevent renters from offering a higher price on rental housing in order to compete in a hot market. Nor does it prevent landlords from soliciting bids in any other advertising venue.

The City responds that targeting only online rental bidding is appropriate because bidding can occur on a much larger scale on those platforms. Yet rental-bidding platforms are in their infancy while market actors have been free to engage in bidding on rental housing for a long time. Underinclusiveness is clear from the City's knee-jerk response to a new form of bidding before the market decides whether to adopt it, while the City ignores bidding that has been allowed for decades.

Even if the City is correct that these fledgling platforms pose a greater threat than other forms of bidding, the City's failure to be even-handed in its regulation still undermines the direct advancement requirement. The City's argument is reminiscent of a similar issue in *Florida Star v.*

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B.J.F., 491 U.S. 524, 540 (1989). There, the government forbade "mass media" from releasing the names of sexual-assault victims but allowed a small-time press to disclose the same information. *Id.* at 526. The government argued that it had a stronger interest in targeting mass media because they reached a wider audience. The Court, however, still held that the law was underinclusive because the government "must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant." *The Florida Star v. B.J.F.*, 491 U.S. at 540. Thus, even if a fledgling start-up could be considered a "giant" in comparison to other advertising forums where bidding can occur, the City must demonstrate even-handedness in its approach to bidding on rents.

B. The moratorium is more extensive than necessary

While the City is correct that it need not choose the least-restrictive alternative to satisfy intermediate scrutiny, the availability of less-restrictive alternatives cuts against a commercial speech restriction's constitutionality. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) ("We agree that the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that § 205(e)(2) is more extensive than necessary."). Less-restrictive alternatives exist to address affordable housing and to ensure that local regulations are not violated. Across the country and at all levels of government, regulators deploy affordable housing solutions without restricting speech—such as upzoning, rental subsidies, or Seattle's multi-family housing tax exemption. As for ensuring that local housing regulations are not transgressed, the less-restrictive alternative is straightforward—allow the responsible City departments to exercise their investigatory and prosecutorial powers in accordance with municipal law. No added layer of speech regulation is necessary.

The City tries to escape these alternatives by artificially narrowing the scope of the City's interests. At the beginning of the City's brief, it says that the moratorium is a "response to the undeniable and unprecedented affordable housing crisis sweeping across the region." Opp. and XMSJ, Dkt. #26 at 1. When Rentberry suggests other ways to address this affordability crisis,

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however, the City insists that alternatives that address affordable housing "have no bearing on the interest the Ordinance is designed to further," which it now claims is just to learn how rental bidding platforms affect the City. *See id.* at 24. The City cannot artificially confine the scope of its interest to avoid scrutiny. In *44 Liquormart, Inc. v. Rhode Island*, for example, the Supreme Court analyzed alternatives to an alcohol price ban at a high level of generality. The Court saw the purpose of the law as an attempt to increase the price of alcohol, which—at that broad level of generality—could be achieved through other means such as increased taxation. 517 U.S. at 507. Likewise, here, the City's purposes should be viewed in their full breadth: to address housing affordability and to ensure compliance with local regulations. There are less-restrictive means to address both these goals. Advertising restrictions like the website ban here are unconstitutional when, as here, there is "no hint" that the government "even considered" alternatives to restricting speech and no explanation "of why the Government believed forbidding advertising was a necessary as opposed to merely convenient means of achieving its interests." *See Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002).

CONCLUSION

A raft of precedent makes clear that communicating a price offer is commercial speech. By banning rental bidding, the City's moratorium restricts that speech. As a speculative measure that unnecessarily restricts speech, it fails to satisfy First Amendment scrutiny. Plaintiffs' motion for summary judgment should be granted, and the City's cross-motion for summary judgment should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2018, I electronically filed the foregoing PLAINTIFFS' RESPONSE TO CROSS-MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties.

Dated: October 4, 2018.

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